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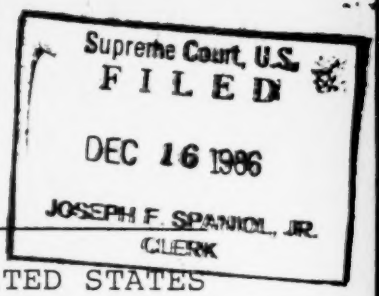

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

CHARLES E. LUTZ,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. Whether outdoor business areas are "open fields" within the meaning of the Fourth Amendment?

2. Whether the warrantless search of Respondent's pasture violated the Fourth Amendment because governmental agents made physical entry into it?

3. Whether governmental agents could rely in good faith on the warrantless search provisions of the statute which heretofore had never been declared unconstitutional?

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PARTIES TO THE PROCEEDING

Petitioner is the Commonwealth of Pennsylvania.

Respondent is Charles E. Lutz.

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania dated October 17, 1986, whose judgment herein is sought to be reviewed, is reported at Commonwealth of Pennsylvania v. Lutz, ____Pa.____, 516 A.2d 339 (1986) and reproduced at Appendix A. The prior decision of the Court of Common Pleas of Westmoreland County, Pennsylvania is unreported but may be found at Appendix B.

JURISDICTION

The Judgment of the Supreme Court of the Commonwealth of Pennsylvania was entered on October 17, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourth Amendment of the United States Constitution, which provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, will not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

This matter was commenced in the state courts by the filing on July 12, 1982 of a criminal complaint charging Respondent, Charles E. Lutz, with hindering or obstructing agents of the Department of Environmental Resources, 35 P.S. 6018.610(7); dumping or permitting the dumping of solid wastes without a permit, 35 P.S. 6018.610(1); and obstructing administration of law or other governmental function, 18 Pa.C.S. 5101. Preliminary hearing was held on September 14, 1982, and all matters were held for court. On November 12, 1982, Respondent filed his omnibus pre-trial motion, see, Appendix C, wherein he moved to suppress certain evidence and to dismiss the charge of hindering or obstructing agents of the Department of Environmental Resources (DER) and the

charge of obstructing administration of law or other governmental function. Respondent premised his motion on the grounds that an attempted search by DER employees violated the Fourth and Fourteenth Amendments to the Constitution. Hearing was held on Respondent's motion on February 28, 1983. On April 29, 1983, the Court of Common Pleas of Westmoreland County, Pennsylvania granted Respondent's motion to dismiss the above-mentioned charges. The court found the motion to suppress evidence moot, as no evidence had been seized. On May 24, 1983, your Petitioner, the Commonwealth of Pennsylvania, filed a timely notice of appeal with the Commonwealth Court of Pennsylvania. On May 17, 1985, that court, without taking any action, transferred the case to the Supreme Court of Pennsylvania pursuant to 42 Pa.C.S. 5103(a), which vests the

Supreme Court with exclusive jurisdiction in cases where a court of common pleas has ruled a state statute unconstitutional. 42 Pa.C.S. 722(7). On October 17, 1986, the Supreme Court of Pennsylvania entered a Judgment and Opinion from which your Petitioner seeks review herein.

B. The Evidence

The matter before this Court arose from an altercation which occurred on April 22, 1982 between Respondent Charles E. Lutz and two agents from the Pennsylvania Department of Environmental Resources, Randall Walton and Rita Coleman. Uncontradicted testimony reveals that: Walton and Coleman met with an informant who alleged that she had seen Respondent Lutz dumping sewage sludge on his land in Westmoreland

County. The meeting occurred on a dirt road along the eastern border of the Lutz property. The informant took Walton and Coleman to the edge of the Lutz property and pointed to the area where the dumping had occurred. According to Coleman, the property was not posted, nor was it fenced. At hearing on his pre-trial motion, Respondent Lutz testified to the contrary, and the trial court resolved the issue in Lutz's favor. Walton and Coleman crossed the property line; the informant remained behind. After entering the property via a dirt road to which the public had access, Coleman shortly smelled the odor of sewage sludge. Coleman and Walton proceeded to the exact area indicated by the informant and started to take samples. While taking a second sample, Coleman heard a truck approaching from

the opposite side of the field from which Coleman and Walton had entered. Respondent Lutz was driving the truck. Lutz approached the DER employees and inquired as to their identities. Both DER representatives identified themselves as such. Lutz wanted to know who had authorized them to be on his land and what purpose they had for being there. Walton answered that they were responding to a complaint, and, when Walton refused to identify the informant, Lutz became upset. Lutz admitted that sewage sludge from the City of Jeanette, Pennsylvania had been dumped; Walton responded that a permit was needed for such activity, while Lutz contended that no permit was necessary and that, further, he, Lutz, had a permit application pending with DER. Lutz, continuing to anger, stated that he wanted to take the DER agents'

samples and with that knocked a sample bottle from Walton's hand. Lutz then picked up the other bottle which was on the ground and threw it against his truck, in an apparent attempt to break the bottle. When the bottle did not break, Lutz picked up both bottles and threw them into the back of his pickup truck. Lutz stated that he had a notion to take Coleman's camera from her; Lutz then lunged at Coleman in an attempt to get the camera and wrestled with her. Coleman, taking evasive action, placed the camera behind her back, and, when the opportunity presented itself, Coleman attempted to toss the camera to Walton. The throw was short, the camera landing in front of Walton. Lutz jumped on Walton's back and attempted to get the camera. Lutz prevailed in the struggle. Lutz then attempted to open the back of the camera, and Walton then

indicated that no pictures had been taken. Lutz did not give the camera back and, at that time, asked that Walton and Coleman leave the property. The agents complied with his request.

In his testimony, Respondent Lutz contributed further to an understanding of the nature, characteristics, and use of the land where he confronted Coleman and Walton. Lutz explained that a road led from his house to the field, which was part of a working farm, and that he arrived at the scene of the eventual altercation in a truck. He admitted that the site of the alleged dumping was a field used to pasture white-faced cows and which was entered by a local gas company servicing wells located in the same field. He further testified that on one side of his property is a trailer park with approximately 150 trailers,

and children from said park are always coming into the fields and building cabins.

C. Rulings Below

The Court of Common Pleas of Westmoreland County, Pennsylvania determined that the warrantless entry provisions of the state Solid Waste Management Act, 35 P.S. 6018.608, did not meet constitutional requirements. Appendix B, page 78a. This was the first time any court had so ruled and indeed was the first time a court had been asked to do so. The Solid Waste Management Act has been in existence since 1980. The common pleas court also held that:

> Given Katz, the "open field" of Hester v. U.S., 265 U.S. 57 (1924) is of doubtful vitality.

Appendix B, page 81a, n. 3. The court of common pleas dismissed the charges

against the criminal defendant, Respondent herein.

The Commonwealth of Pennsylvania, your Petitioner, appealed, contending that the above statute is constitutionally sufficient, that the DER agents properly relied upon a legislatively enacted statute which was in effect at the time of the incident, that the field in question was an open field and the search was valid, Hester, supra; Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and further that Respondent's resort to self-help was improper.

REASONS FOR GRANTING THE REVIEW

Certiorari should be granted to clarify the principles enunciated by this Court in Oliver v. United States,

466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), and in Dow Chemical Company v. United States, ___ U.S. ____, 106 S.Ct. 1819, ___ L.Ed.2d ___ (1986), as they apply to outdoor business activities. The Opinion of the Supreme Court of Pennsylvania interprets Dow as holding that outdoor business areas are not open fields, thereby narrowing drastically and sapping vitality from the open field doctrine, see, Hester v. United States, 265 U.S. 57 (1924), which was recently reaffirmed in Oliver, supra. According to the Supreme Court of Pennsylvania, the crucial occurrence in the instant matter was the fact that the governmental agents made physical entry onto Respondent's business property. Implicit in the Pennsylvania Supreme Courts' modification of Oliver and Dow is the establishment of a

"business curtilage exception" to the open fields doctrine. In Dow, at note 7, this Court specifically withheld ruling on the concept of "business curtilage" as enunciated in United States v. Swart, 679 F.2d 698 (7th Cir. 1982). However, the Supreme Court of Pennsylvania, undaunted by the aforementioned judicial restraint, applied Federal constitutional provisions (see, Appendix A, page 30a, n. 12, where the Pennsylvania Supreme Court specifically noted that Respondent was attacking the search only on Federal grounds, thus there being no independent state gounds upon which the Pennsylvania Supreme Court's decision can be founded) and ventured into an area which this Court had chosen not to enter. The Pennsylvania Supreme Court found that Dow required this result, notwithstanding

that this Court refrained from reaching this issue. By so doing, the Pennsylvania Supreme court proclaimed itself to be the final arbitor of a Federal question and has decided an important question of Federal law which had not been, but should be, settled by this Court.

Further, the decision of the Pennsylvania Supreme Court deciding this Federal question is in conflict with the decision of the 8th Circuit Court of Appeals in McDowell v. United States, 383 F.2d 599 (8th Cir. 1967), where, at page 603, the Court stated:

> [6] The contention of appellants that the fields were entitled to the protection of the Fourth Amendment as being within the curtilage of a commercial enterprise is without merit. Although the Supreme Court has recently expanded the Fourth Amendment protection of the business

> enterprise, See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed. 943 (1967), it has not expanded such protection beyond that which a private dwelling and the curtilage thereof is likelise [sic] entitled. Therefore, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally "unreasonable."

To buttress its unique position, the Pennsylvania Supreme Court relied on only two decisions: United States v. Swart, 679 F.2d 698 (7th Cir. 1982), wherein a used car dealer's parking lot was held to be part of the "business curtilage" and was not subject to a warrantless search after business hours; and Allinder v. Ohio, 614 F.Supp. 282 (N.D. Ohio 1985), appeal pending, No. 85-3664 (6th Cir.), wherein the court held that the open fields doctrine cannot apply to warrantless administrative

searches of a beekeeping facility. Reliance on these cases is misplaced, as each is distinguishable from the matter sub judice.

Swart was decided prior to this Court's decisions in both Oliver and Dow, supra; thus, the 7th Circuit did not have the benefit of this Court's reasoning. The search in Swart occurred at night when the business was closed. Additionally, due to the fact that the cars which were the subject of the search were on a lot, entry to which had already been refused to the police, the court found that the owner had a reasonable expectation of privacy and that the cars may have been within the "business curtilage".

Allinder v. Ohio, supra, is distinguishable from the matter now before this Court. In Allinder, the Ohio Apiary Inspection Law was challenged.

The District Court found the law to be unconstitutional, as it purported to authorize non-consensual apiary inspections without a warrant or its equivalent, and permanently enjoined Ohio from conducting warrantless inspections pursuant to tne Apiary Inspection Law. The court found the facts in Allinder to be atypical, in that the commercial activity under question consisted of bee colonies in four counties. It distinguished Oliver from Allinder in that the criminal activity discovered in Oliver was unlike the commercial activity in Allinder, which was both legal and valuable to society. The court emphasized this distinction and relied on footnote 13 in Oliver, wherein this Court stated: "Certainly the framers did not intend that the 4th Amendment should shelter criminal activity wherever persons with criminal

intent choose to erect barriers and post no-trespassing signs." The Allinder court also found that the government inspection was sufficiently intrusive so that a warrant was required. The approved inspection technique required the opening of the bee colony, manipulation of the frames, location of the queen, and examination of the brood.

In the instant matter, nothing of a comparable nature occurred. Respondent's activities were not shielded from public view. He conducted his dumping of solid waste in an open field in plain view of someone beyond the border of his land, well beyond the curtilage of his home. Further, that the field in question was an open field cannot be debated based upon the record. The field was a pasture, part of Respondent's working farm.

Respondent used the pasture to pasture white-faced cows. It was located far enough from Respondent's house that he used a truck to drive to it when he confronted the DER employees. Respondent testified that individuals frequently came onto this land and were always building cabins thereon. Further, it should not be forgotten that Respondent testified that the gas company would enter the property to service gas wells located thereon.

Noteworthy also is the entry and sampling procedure used in this matter as contrasted with that condemned in Allinder. Here the DER agents sought only to fill two sample bottles by dipping them in the liquid material on Respondent's land. There was no "opening of the bee colony" and no "examination of the brood". This

minimal presence pales in comparison with the intrusion in Allinder and could not be construed as interfering with any legitimate commercial activity. No explanation can be offered for Respondent's violent reaction which turned a simple task into an explosive situation threatening all involved.

Since the property was an open field, the 4th Amendment does not apply to this situation. Oliver, supra. In an open field, one cannot have a reasonable expectation of privacy, because of the very nature of the field. However, the Supreme Court of Pennsylvania decided that physical entry was a crucial factor and, upon it, distinguished this matter from Dow, supra. The reasoning of the Pennsylvania Supreme Court is based upon this Court's language in Dow, 106 S.Ct. at 1825-26, wherein this Court stated:

> Admittedly, Dow's enclosed planned complex, like the area in Oliver, does not fall precisely within the "open fields" doctrine. The area at issue here can perhaps be seen as falling somewhere between "open fields" and curtilage, but lacking some of the critical characteristics of both. Dow's inner manufacturing areas are elaborately secured to ensure they are not open or exposed to the public and the ground. Any actual physical entry by EPA into any enclosed area would raise significantly different questions, because "the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." See v. City of Seattle, supra, at 543. The narrow issue raised by Dow's claim of search and seizure, however, concerns aerial observation of a 2,000 acre outdoor manufacturing facility without physical entry.

Your Petitioner submits that the Pennsylvania Supreme Court wrongly

interpreted the above language to include all the fenced areas of Dow's plant, not simply the inner manufacturing areas. That no protection was meant to be accorded the outdoor areas is clear, since the sentence preceding the foregoing quote provides as follows:

> The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.

Therefore, Petitioner contends, once it has been determined that the land in question is an open field, trespass or physical entry makes no matter. Oliver, supra.

The statute which was challenged in the lower court had never, prior to the lower court's ruling, been declared unconstitutional. Petitioner submits that the governmental agents had the

right to rely on the legislatively-enacted statute and that their reliance was in good faith. As such, the charges should not have been dismissed. See, Illinois v. Krull, 481 N.E.2d 703 (1985), cert. granted, 106 S.Ct. 1456 (May 1986).

CONCLUSION

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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Date: December 16, 1986